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Massachusetts Cable Television Commission

CABLE BULLETIN

Number 88 - 1 May 2, 1988

Commission Actions

Commission Grants Licensing Waivers in Towns of Berlin and Bolton

The Commission recently granted waivers authorizing new initial licensing processes in the Towns of Berlin and Bolton. In both communities, two applicants underwent ownership changes after the filing of initial applications. Commission precedent limits the entry of new applicants after the initiation of the licensing process. Rather than proceed with the licensing process and risk the possibility of later litigation, both Towns requested, and the Commission granted, waivers allowing the Towns to start new, abbreviated licensing processes.

North Attleborough and Taunton

The Commission recently advised Tele-Communications, Inc. that its 1986 purchase of 65% of the stock of UA-Columbia of Massachusetts, the cable licensee in North Attleborough and Taunton, was not in accordance with state law governing the transfer of cable licenses. Under Commission regulations, such a transfer of control of the license requires filing of a Form 100 transfer application. The state cable statute, M.G.L. ch. 166A, §7, requires public hearings and approval by the issuing authorities before the transfer is effective. The Commission ordered the transferee and the transferor to file a Form 100 with the Commission and each issuing authority.

East and North Brookfield

The Commission denied requests of North and East Brookfield to waive Commission regulations to permit an extension of their provisional license periods. The provisional licenses were signed in 1985. Contrary to Commission regulations, however, the selectmen extended the provisional licenses well beyond one year. The Commission did not grant the requested extensions because the lengthy delays violated state regulations and continued delays would not be in the public interest. As a result of the Commission's later grant of waivers allowing new, abbreviated licensing processes, each town received four license applications.

Commission Advisory Opinions and Interpretations

Advisory Opinion on Reimbursement for Cost of Consultant Services

On December 3, 1987, the Cable Commission issued an Advisory Opinion allowing

the Town of Barnstable to negotiate a renewal license provision requiring operator reimbursement of the cost to the Town of cable consultant services incurred during the license renewal process. The Commission based its decision on federal Cable Act language which excludes from franchise fee limits any "requirements incidental to the awarding or enforcing of the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties or liquidated damages . . . ." 47 U.S.C. §542(g)(2)(D).

The Commission explained that nothing in the state cable statute's license fee cap, M.G.L. ch.166A, §9, prevents a municipality from recovering reasonable costs associated with the awarding of its franchise. The Advisory Opinion overturned a previous Commission opinion on the subject issued June 15, 1981.

Logging of Both Written and Verbal Complaints Required

In response to a recent request from the Hull Cable Advisory Committee, the Commission reaffirmed a February 17, 1983 opinion that cable operators must log both written and oral complaints on standard complaint forms (Forms 500A, B and C) filed with the Commission and the issuing authority. The Commission is currently exploring revision of the forms.

Billing & Termination of Service

The Commission has advised cable operators that:

o under M.G.L. ch.166A, §5(1), operators must automatically grant a subscriber a pro rata credit or rebate for service outages of which the operator is aware;

o under 207 CMR 10.05(4), cable operators must provide a separate written notice before service may be terminated; and

o under 207 CMR 10.02(5), notice placed on the community bulletin board channel is inadequate notice to subscribers of a rate increase.

Appeals

Somerset

The Commission will decide whether the Town of Somerset acted arbitrarily and unreasonably when it denied the license transfer application of Heritage Cablevision to Tele-Communications, Inc. ("TCI"). TCI appealed the Board of Selectmen's decision to the Commission, arguing that the selectmen had no reasonable basis to deny the license transfer. M.G.L. ch.166A, §7. TCI also urged that federal law preempts the Town from basing a transfer denial on a transferee's programming and ownership of programming interests. The Town argued that transferee TCI would be unresponsive to the community's needs, and that the transfer would have a detrimental effect on service. CATV No. A-64.

Belmont

In March, Belmont Cable Associates ("BCA") filed an appeal with the Commission after the Belmont Board of Selectmen voted to award a license to Nashoba Cable ("Nashoba") and award it a lease of a municipally owned cable system. BCA alleges that Nashoba's application failed to disclose, as the issuing authority report requires, that Nashoba is allegedly involved in a "proceeding" in the Town of

Danvers. BCA also alleges that Nashoba failed to disclose adequately the status of its limited partnership interests. Both Nashoba and the Town of Belmont filed answers to rebut these claims. CATV No. A-65.

Commission Proceedings Before the FCC

Mashpee

In a nationally significant case, the Federal Communications Commission ("FCC") decided in favor of the Cable Commission that a cable system serving the New Seabury resort community must be licensed by the local issuing authority in accordance with state cable law. The Commission argued successfully that a system serving detached single family dwellings was not within the federal Cable Act licensing exemption for Satellite Master Antenna Television ("SMATV") systems. In the Matter of Massachusetts Community Antenna Television Commission, CSR N-2997, released December 10, 1987. Channel One has filed an appeal of the FCC's decision with the federal court and the Commission has filed a motion to intervene.

FCC Issues Decision in Rate Deregulation Proceeding

In December, the Commission participated in a formal rulemaking in which the FCC changed the definition of "effective competition," the standard which governs whether communities may have rate regulation. While the text of the decision has yet to be released, the FCC has adopted and announced certain changes. The FCC used to define effective competition as the receipt of three or more broadcast signals over any portion of the community. Under the new rules, a cable system may become rate regulated if the three broadcast signals do not cover 100% of the community. The second part of the rate regulation formula, whether a station is "significantly viewed," was also altered. Instead of using a county-wide measurement, such statistics must now be compiled on a community basis, and the operator has the burden of making the showing.

The Cable Commission, along with Springfield, Williamstown, and Boston all filed separate comments in the rulemaking. All asked the FCC to adopt a deregulation standard that more meaningfully measures competition to cable. Massachusetts filed more comments than any other state.

Court Actions

Norwood Rate Freeze Decision

The Massachusetts Supreme Judicial Court ("SJC") recently decided that the Town of Norwood could enforce a rate freeze provision in its license with Adams-Russell. The case arose after the cable operator nearly doubled its rates in 1985, despite a provision in the license calling for a rate freeze until two years after completion of the system. The Court, noting that Adams-Russell freely entered into the rate freeze in order to win the license from the Town, ruled that "[n]either the Cable Act nor FCC decisions preempt the Town from enforcing a time limited, mutually agreed upon, rate freeze provision." The SJC emphasized that the Town has a right to enforce such license provisions since it was "not enacting any regulation that would give the [T]own permanent control over the rates charged for cable television service."

Access-to-Premises Statute - Recent Developments

The Massachusetts access-to-premises law, which authorized cable operator entry into multiple unit dwellings for cable installations, M.G.L. ch.166A, §22, was found unconstitutional by a state Superior Court. Waltham Tele-Communications v. O'Brien, Middlesex Superior Court No. 86-6325 (October 23, 1987). The court ruled that the state Constitution and eminent domain law require a clear right to a jury trial in such takings of private property, which the court believed §22 did not provide. The Commission and cable operators are appealing the case. Section 22 and the Commission's access-to-premises regulations are not in force at this time.

Must-carry

For the second time in two years, the U.S. Court of Appeals (D.C. Circuit) has overturned FCC must-carry rules, which require cable operators to carry certain local broadcast signals. Century Communications v. FCC, No. 86-1683 (D.C. Cir. Dec. 11, 1987). Though the court once again did not find that must-carry rules are necessarily unconstitutional, it did rule that the latest version of the rules does not satisfy the relevant First Amendment test. The decision left intact FCC rules requiring cable operators to provide A/B switch information, and upon request, to provide the A/B switches themselves to subscribers.

Legislation

Open Meeting Law Amended

The legislature recently amended the open meeting law, M.G.L. ch.39, §23B, to permit use of "videotape equipment" to record public meetings of governmental bodies. The equipment must be in a fixed location designated by the governmental body. The statute does not address use of such equipment for live coverage.

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Massachusetts Cable Television Commission

CABLE BULLETIN

Number 93-2 May 10, 1993

As promised, we are contacting you to inform you that the Federal Communications Commission (the "FCC") has issued its Final Report and Order in connection with the rate regulation portion of the Cable Television Consumer Protection and Competition Act of 1992 (the "Act").

For your reference, we have attached an Executive Summary which was published by the FCC. The entire Report and Order is approximately 500 pages long and has been criticized by many for its substantive and procedural complexity. We have a copy of the complete Report and Order in our office which you may review and photocopy at $.20/page. If you wish to receive a copy of the entire document, you can contact the Downtown Copy Center in Washington, D.C. at (202) 452-1422. The copy center charges approximately $80 to copy the document, a handling fee of $35 plus postage.

The FCC has clarified that the term "'franchising authority' means, for rate regulation purposes, the authority empowered by state law to regulate rates. In Massachusetts' case, this entity is MCATC [the Massachusetts Community Antenna Television Commission] . . . . ."

During the next few weeks we will be reviewing and digesting the FCC's Report and Order and will be formulating the process for rate regulation in the Commonwealth. We will rely heavily on your input to ensure that our regulations and procedures incorporate local considerations.

We anticipate that we will be contacting you periodically over the course of the next several months in order to keep you apprised of the details of the rate regulation process. In the meantime, as always, if you have any questions, comments or suggestions, please do not hesitate to call the Commission at (617) 727-6925.

THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF CONSUMER AFFAIRS AND BUSINESS REGULATION
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JOHN M. URBAN
Commissioner

(617) 727-6925

May 10, 1993

Dear Cable Advisory Committee Member:

The Federal Communications Commission (the "FCC") has issued its Final Report and Order in connection with the rate regulation portion of the Cable Television Consumer Protection and Competition Act of 1992 (the "Act").

In an effort to keep Massachusetts communities fully informed, we have sent a copy of the FCC's Executive Summary of the Report and Order to all issuing authorities. As we noted in our earlier correspondence, the language used in the 1992 Cable Act had raised some questions as to who would regulate rate in Massachusetts. The FCC, in its Report and Order, clarified this issue by stating that "'franchising authority' means, for rate regulation purposes, the authority empowered by state law to regulate rates. In Massachusetts' case, this entity is MCATC [the Massachusetts Community Antenna Commission] . . . ."

While we believe that the FCC sought to create a streamlined process for regulation, many have criticized the FCC's rate regulation rulemaking for its substantive and procedural complexity. During the next few weeks we will be reviewing and digesting the FCC's Report and Order and will be formulating the process for rate regulation in the Commonwealth. We will rely heavily on input from municipal representatives to ensure that our regulations and procedures incorporate local considerations.

We anticipate that we will be contacting local representatives periodically over the course of the next several months in order to keep interested parties apprised of the details of the rate regulation process. In the meantime, as always, if you have any questions, comments or suggestions, please do not hesitate to call.

Sincerely,

John M. Urban
Commissioner

APPENDIX A

Cable Rate Regulation Executive Summary

I. Introduction

1. This Report and Order and Further Notice of Proposed Rulemaking amends the Commission's rules to implement Sections 623 (subscriber rate regulation), 612 (commercial leased access), and 622(c)(subscriber bill itemization), of the Communications Act of 1934, as amended by the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992 or "1992 Cable Act").[1] The Report and Order reflects, in large part, the Commission's efforts to ensure that cable subscribers nationwide enjoy the rates that would be charged by cable systems operating in a competitive environment. The Further Notice examines whether the Commission should refine its initial analysis by excluding the rates of cable systems with less than 30 percent penetration from its analysis of systems facing effective competition, even though such systems are defined as systems that face effective competition under the 1992 Cable Act.

2. The Cable Act of 1992 generally provides that where competition is present, cable television rates shall not be subject to regulation by government but shall be regulated by the market. The Act contains a clear and explicit preference for competitive resolution of issues where that is feasible. However, where competition is absent, cable rates are to be regulated to protect the interests of subscribers. This regulation is to be undertaken jointly by the Federal Communications Commission and by state and local governments. Local (or state) governments are primarily responsible for the regulation of rates for programming service and equipment on the basic service tier, and this Commission will entertain complaints against the rates for programming services and equipment for the cable programming services tier or tiers. (Services offered on a per-channel or per-program basis are not subject to rate regulation).

3. The primary results of this proceeding are: 1) development of a process for identifying those situations where effective competition exists (and rate regulation is thus

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[1] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, §§ 3, 9, 14, 106 Stat. 1460 (1992) ("Cable Act of 1992"). The Cable Act of 1992 became law on October 5, 1992. This proceeding was commenced through the issuance of our Notice of Proposed Rule Making in Docket 92-266, 8 FCC Rcd 510 (1992) ("Notice"). The Commission is required to prescribe regulations to carry out its obligations under the rate regulation provisions of the Act within 180 days of the law's enactment.

precluded), 2) establishment of the boundaries between local and state, and federal responsibilities, 3) development of procedural and substantive rules to govern the regulation of basic service tier, cable programming service, and leased channel rates, and 4) creation of a process of gathering information to facilitate the regulation that is being undertaken and periodically review its effectiveness.

4. In the Report and Order, the Commission seeks a comprehensive approach to cable rate regulation that achieves a reasonable balancing of statutory requirements and that will promote the broad policy objectives reflected in the statute. As required by the 1992 Cable Act, it provides for regulation of cable rates by local franchising authorities and the Commission pursuant to jurisdictional and procedural requirements that have been designed to reduce burdens on cable operators, local authorities, the Commission, and consumers. In addition, the requirements that will govern permitted rate levels for cable service and reflect a balancing of the interests of consumers and of cable operators. In this regard, the initial rate regulations should produce substantial savings to consumers on an aggregate industry basis. These savings will result from rate reductions required from a broad segment of regulated cable operators that service most of the nation's cable subscribers. The required rate reductions should not hinder the ability of the cable industry to continue to provide quality services to consumers. On a going forward basis, price caps for regulated cable systems will reduce administrative burdens and permit the continued growth of services while effectively governing future rate levels.

5. The regulations adopted today may well change over time. In accordance with the statute, the Commission will review and monitor the effect of our initial rate regulations on the cable industry and consumers, and refine and improve our rules as necessary. In addition, it will issue separately a Second Further Notice to obtain a better record for adoption of cost-of-service showings by cable operators seeking to raise rates above capped levels. This step is necessary to assure that the regulations governing such showings will correctly balance the interests of consumers in paying a fair rate and of cable operators in earning a reasonable profit.

II. Report and Order

A. Rate Regulation of Cable Service

1. Rollback of Cable Service Rates

6. The Report and Order finds that Congress was concerned that rates of systems not subject to effective competition reflect undue market power and are unreasonable to the extent they exceed competitive rate levels. This conclusion is

based upon the findings and goals of the Cable Act of 1992, the overall scheme of regulation under it, and the fact that the Commission must consider the rates of systems subject to effective competition in establishing rate regulations. Additionally, the Commission conducted a survey of cable system rates as of September 30, 1992, which revealed that, on average, rates of systems not subject to effective competition are approximately 10 percent higher than rates of comparable systems subject to effective competition, as that term is defined in the statute. Thus, the Commission's survey supports the findings of Congress that current rates for cable systems not subject to effective competition reflect pervasive market power.

7. The Commission concludes, therefore, that its initial effort to regulate rates for cable service should provide for reductions from current rates of cable systems exhibiting undue market power. The Commission's initial implementation of rate regulation of cable service will generally lead to significant reductions from current rate levels for most cable systems. Our approach will enable local franchise authorities to require rates for the basic tier, and the Commission to require rates for cable programming services on the basis of individual complaints, to fall approximately 10 percent, unless the operator is already charging rates that are at the "competitive" benchmark level or it can justify a higher rate from September 30, 1992 levels, based on costs. The Commission estimates that this rollback will affect approximately three-quarters of cable systems, with a total consumer benefit of approximately $1 billion. Rates of all regulated systems will then be subject to a price cap that will govern the extent to which rates can be raised in the future without a cost-of-service showing. We will also examine systems with rates substantially above the benchmark and will seek to refine the benchmark through further industry surveys.

2. Standards and Procedures for Identifying Cable Systems Not Subject to Effective Competition

a. Application of Effective Competition Tests

8. Cable service and equipment rates may only be regulated under the Cable Consumer Protection and Competition Act of 1992 ("1992 Act") if the cable system is not subject to effective competition. Under the statute, "effective competition" exists if: **(a)** fewer than 30 percent of households in the franchise area subscribe to the cable service of a cable system; **(b)** (i) the franchise area is served by at least two unaffiliated multichannel video programming distributors ("multichannel distributors"), each of which offers comparable programming to at least 50 percent of households in the franchise area, and (ii) the number of households subscribing to programming services offered by multichannel distributors other than the largest multichannel distributor exceeds 15 percent of households in the franchise area; or **(c)** the

franchise authority itself is a multichannel distributor and offers video programming to at least 50 percent of the households in the franchise area.

(1) Multichannel Video Programming Distributor

9. When applying the above definition, multichannel distributors will include cable systems, MMDS operators, SMATV systems, DBS operators, TVRO distributors and video dialtone service providers. We here determine that programmers using leased access channels on cable systems will not be considered multichannel distributors.

(2) Availability of Competing Services

10. A multichannel distributor's service is "offered" in a franchise area if the service is both technically and actually available, with no regulatory, technical or other impediments to households taking service. Service will be deemed to be "technically available" when the multichannel distributor is physically able to deliver the service to a household wishing to subscribe, with only minimal additional investment by the distributor. A service will be considered "actually available" if subscribers in the franchise area are reasonably aware through marketing efforts that the service is available.

(3) Definition of Household

11. We define the term "household" as each separately billed or billable customer, except that we treat individual residences of multiple dwelling units as separate households.

(4) Measurement of Subscribership

12. For purposes of applying the 30 percent threshold in the first effective competition test, the measurement of subscribership will be based on that of the particular system in question, and not an aggregation of all cable systems or competitors in the franchise area. For purposes of applying the 15 percent threshold in the second effective competition test, subscribership of alternative multichannel distributors will be calculated on a cumulative basis; however, only those multichannel distributors that offer programming to at least 50 percent of the households in the franchise area will be included in the 15 percent cumulative measurement.

(5) Program Comparability

13. A multichannel distributor will be deemed to offer "comparable programming" to that provided by a cable system if it offers at least twelve channels of video programming, including at least one nonbroadcast channel.

b. **Finding of Effective Competition:**

14. For purposes of implementing rate regulation by local franchising authorities, we presume that cable operators are not subject to effective competition. Franchising authorities may rely on this presumption when filing a certification with the Commission to regulate basic rates. The cable operator will then have the burden of rebutting this presumption with evidence demonstrating that effective competition does in fact exist.

15. To ensure that cable operators have access to the data they need to mount a successful challenge to the presumption against effective competition, alternative multichannel distributors will be required to respond, within 15 days, to requests from cable operators for relevant information. Responses by the alternative distributors may be limited to the numerical totals needed to calculate the distributor's reach and penetration in the franchise area.

3. Regulation of the Basic Service Tier

a. Assertion of Jurisdiction over Basic Service and Equipment Rates

(1) Jurisdiction Over Basic Rate Regulation

16. The 1992 Cable Act requires local authorities wishing to regulate basic service and equipment rates to certify in writing to the Commission that (1) its rate regulations will be consistent with the rate regulations we prescribe; (2) it has the legal authority to adopt, and the personnel to administer, rate regulations; and (3) its procedural rules provide an opportunity for consideration of the views of interested parties. Such certification filed with the Commission by a franchising authority will become effective 30 days after filing unless the Commission finds, after notice and a reasonable opportunity to comment, that the franchising authority has not met one of the three criteria above. If the Commission disapproves the certification, the franchising authority will be notified of any revisions or modifications necessary to gain approval. If the Commission disapproves or revokes a certification, we will exercise the franchise authority's regulatory jurisdiction until the authority becomes qualified by filing a new certification that meets the requirements set forth above. Such new certifications become effective upon approval by the Commission, which approval (or disapproval) will be issued within 90 days of filing.

(a) Division of Jurisdiction Between FCC and Local Governments

17. Under the statute, local franchising authorities and the Commission have shared jurisdiction over the regulation of basic service and equipment rates. However, the Commission will not exercise jurisdiction unless either (a) a local franchising authority's certification is denied or revoked, or (b) the franchising authority requests us to regulate basic rates because it has insufficient resources to regulate or it lacks the legal authority to do so. Franchising authorities requesting Commission intervention on the basis of insufficient funds must submit a showing explaining why the franchise fees it obtains cannot be used to cover the cost of rate regulation at the local level. The Commission will not regulate basic rates where a local government voluntarily chooses not to seek certification because it is satisfied with the rates charged by the local cable operator.

(b) Preemption Issues

AA. Preemption of Franchise Agreements

18. All provisions in franchising agreements that prohibit rate regulation by franchise authorities are preempted by the 1992 Cable Act. Regardless of any provision in the franchise agreement, then, a franchising authority may regulate rates for basic service and equipment if the authority meets the certification standards.

BB. Preemption of State Law

19. State laws that preclude rate regulation are not preempted, although in such cases the Commission will assume jurisdiction over basic service and equipment rates. Similarly, state laws that prohibit local governments, but not state governments, from engaging in rate regulation are not preempted; in these cases, basic rate regulation will be conducted at the state level.

(2) The Certification Process

(a) The Certification Form

20. Franchising authorities intending to regulate basic rates must first submit a form certification with the Commission. This form, which will be available from the FCC, will certify that the franchising authority has met the statutory requirements (set forth above) for seeking certification and will further certify that, to the best of the franchising authority's knowledge, effective competition does not exist in the franchise area.

(b) Joint Certification

21. We decide that joint certification for communities served by the same cable system is permitted but not required.

Joint certification for communities served by different systems is also permitted. A state may not file a blanket certification on behalf of its franchising authorities. However, if a state (e.g. a statewide public utilities commission) is the franchising authority, it is entitled to file the certification for itself.

(c) Approval of Certification by the Commission

22. Franchising authorities may begin filing certifications with the Commission 30 days after publication of the Report and Order in the Federal Register, although there is no deadline by which a franchising authority must seek certification. Under the statute, a certification will go into effect in 30 days unless the Commission finds that it is defective. The franchising authority must either mail the form by registered mail, return receipt requested, or hand-deliver the form and obtain a date-stamped copy. The 30-day period will run from the date stamped on the return receipt or copy. However, franchising authorities will not be able to begin regulating rates until they have adopted regulations consistent with those adopted by the Commission in the Report and Order and have implemented rules which give interested parties a reasonable opportunity to comment during the rate regulation process. Franchising authorities have 120 days from the effective date of certification to adopt these rules and regulations.

23. Cable operators may file a petition for reconsideration challenging the franchising authority's certification.. Such petitions may be filed any time within the 30-day period after a certification has become effective. An operator filing a petition for reconsideration on the ground that it is subject to effective competition will be granted an automatic stay of rate regulation until resolution of the petition, subject to refund liability back to the date the petition was filed if the Commission subsequently determines that there is no effective competition. Cable operators that file frivolous effective competition petitions to take advantage of the automatic stay provision will be subject to forfeitures.

24. If an operator believes that a franchise authority cannot be certified due to other defects (e.g., it does not have the legal authority, it lacks adequate resources or its rate regulations are not consistent with ours), the operator may file either a petition for reconsideration (which would be filed within 30 days after the certification becomes effective) or a petition for revocation (which could be filed at any time). Operators filing such petitions will not be entitled to an automatic stay of regulation but may request a stay.

25. Where we deny a certification on other than effective competition grounds, the franchising authority will be notified and informed of any modifications that must be made in

order to obtain Commission approval. If, after this opportunity to cure, the authority still fails to meet the certification requirements, its certification will be revoked.

(d) Revocation of Certification

26. We will revoke a franchising authority's certification if, after a reasonable opportunity to comment, it is determined that state and local laws and regulations do not conform to the Commission's rate regulations governing cable rates. A franchising authority's certification may be revoked if, after remand, a franchising authority fails to fulfill one of the three conditions for certification set forth above. In cases of revocation, the Commission will assume jurisdiction over basic service rates until an authority becomes recertified. In those cases remanded back to the franchising authority, an opportunity will be provided to cure defects with directions on how this may be accomplished. Resubmissions will be considered on an expedited basis. A franchising authority's certification will be revoked in these cases only if the authority fails to implement the remand order. While a petition for revocation is pending however, and absent grant of a stay, the franchising authority may continue to regulate the basic service rates of its franchisees.

27. A cable operator once not subject to effective competition that later becomes subject to effective competition, may petition the franchising authority for change in its regulatory status. The operator bears the burden of proving the existence of effective competition. After an initial determination of the franchising authority that effective competition exists becomes final, the franchising authority will then cease regulating basic cable service rates, and the Commission's regulatory authority over cable programming services for the system in the franchise area will also cease. Cable operators denied a change in status by a franchising authority may seek review of that finding at the Commission by filing a petition for revocation. A joint statement may also be submitted by the cable operator and a franchising authority stating that effective competition exists. The joint statement must state which of the three statutory tests for effective competition has been met and explain how the test has been satisfied.

(e) Assumption of Jurisdiction

28. If the Commission denies or revokes a franchising authority's certification, it will exercise the franchising authority's jurisdiction over basic rate regulation until the authority requalifies. Upon denial of or revocation of certification, the Commission will assume jurisdiction and notify the local franchising authority and the cable operator. The notification to the cable operator will require it to file its basic rate schedule with the Commission within 30 days, with a copy

to the local franchising authority. Basic rate filings for existing rates or proposed rate increases for services and equipment (including increases in the baseline channel charge that results in the number of channels in a tier) must be accompanied by the appropriate FCC forms. Cable operators with existing or proposed rates above the permitted tier rate must submit a cost-of-service showing sufficient to support a finding that the rates are reasonable. Until further notice, cost-of-service showings should be made pursuant to the interim standards set forth in this document.

29. The Commission will assume basic rate jurisdiction until the franchising authority files a "petition for recertification" that is subsequently approved. The petition should contain a clear showing, supported by either objectively verifiable data such as a state statute, or affidavit, that the underlying reasons for revocation or denial no longer pertain, and must attach a copy of the earlier decision denying or revoking the original certification.

b. Implementation and Enforcement of Basic Tier Rates

(1) Review by Local Franchising Authorities

(a) Initiation of Basic Cable Rate Review

30. Once a franchising authority has been certified and has adopted the appropriate rules, it must notify the cable operator that these requirements have been met and that it intends to regulate basic service rates. The cable operator will then have 30 days to file its basic rate schedule (and any supporting material concerning the reasonableness of its rates) with the franchising authority.

(b) Franchising Authority Review of Basic Cable Rates

31. A two-step approach will be used regarding franchise authority review of a cable operator's current rates for the basic service tier and accompanying equipment, or proposed increases in those rates. Under the first step, if a franchising authority is able to determine that a cable operator's current rates are within the Commission's reasonable rate standards, the rates could go into effect 30 days after they were submitted. Also, if the franchising authority found that a proposed rate increase was within the Commission's rate standards, the increase could go into effect 30 days after filing with the franchising authority.

32. Under the second step, if the franchising authority is unable to determine whether the rate in issue is within the Commission's reasonable rate standard, based on the material before it, or if the cable operator has submitted a cost-of-service

showing seeking to justify a rate above the Commission's reasonable rate level, the franchising authority may take an additional period of time to make a final determination and toll the effective date of the proposed rates for a commensurate period. A franchising authority may take an additional 90 days if it needs more time to ensure that a rate is within the Commission's rate standard. The authority may take an additional 150 days to evaluate a cost-of-service showing seeking to justify a rate above the reasonable rate level. The authority must issue a brief written decision regarding its invocation of the additional time period. If no action is taken within these time periods, the proposed rates will go into effect, subject to subsequent refund orders if a franchising authority later issues a decision disapproving any portion of the proposed rates.

(c) Due Process Concerns

33. A cable operator is required to notify subscribers in writing of a proposed rate increase at approximately the same time it notifies the franchising authority, i.e., at least 30 days before any proposed increase is effective. An operator, however, will not be required to publish a notice of a proposed rate increase in newspapers or provide information to subscribers regarding how to lodge a complaint. Operators will be required to include in their subscriber notifications the name and address of the local franchising authority, so that the requisite information on complaint procedures can be readily obtained by a subscriber.

34. A franchising authority is required to issue a written decision to the public whenever it disapproves either an initial basic cable rate or a request for an increase in whole or in part, or approves a proposed rate over the objections of interested parties. However, we will not require an authority to issue a written decision if it is approving a basic cable rate or rate increase in its entirety and there have been no objections.

(d) Proprietary Information

35. Franchising authorities have the right to collect information, including proprietary information, in order to make a rate determination in those cases where operators have submitted initial rates or have proposed increases that exceed the Commission's reasonable rate standard. In cases where initial or proposed rates comply with the Commission's rate standard, however, requests for additional information should relate to proper documentation that an operator's prices are in accord with that standard.

(2) Remedies and Appeals

(a) Remedies for Unreasonable Basic Cable Rates

36. Franchising authorities may order prospective rate reductions and, where they have determined that existing or proposed rates are unreasonable, prescribe a reasonable rate.

37. Franchising authorities may also invoke the remedy of ordering refunds in three situations: First, if an operator fails to comply with a rate decision and continues to charge unreasonable rates, the authority can order refunds back to the effective date of its rate order. Second, as part of its initial review of existing cable rates, an authority has the discretion to order refunds for unreasonable rates that exceed the Commission's permitted tier charge and are not supported by a persuasive cost-of-service showing by the operator. Third, if an authority has tolled a proposed rate increase for 90 or 150 additional days and has not completed its review by the end of these time periods, the proposed rates can go into effect subject to a refund if portions of the rates are later found to be unreasonable. For situations two and three above, the refund period is limited to a maximum of one year.

(b) Forum for Appeals of Local Authorities' Decisions

38. The Commission will exercise exclusive jurisdiction over appeals of local rate decisions involving whether the franchising authority has acted inconsistently with the rate regulation provisions of the Cable Act or our implementing rules.

(3) Notification of Availability of the Basic Service Tier

39. Cable operators are required to notify subscribers of the availability of basic tier service within 90 days or three billing cycles from the effective date of the rules adopted in this proceeding and are required to notify new subscribers at the time of installation. Operators who can demonstrate that they have satisfied the notification requirement in the twelve months prior to the effective date of the cable regulations will be exempt from this requirement, provided that their notice conforms to the format and content requirements of our rules.

c. Regulation of Basic Service Tier Rates and Equipment

(1) Components of the Basic Service Tier Subject to Rate Regulation

(a) Introduction and (b) General Requirements

40. The 1992 Cable Act requires cable operators to offer subscribers a separately available basic service tier to which subscription is required for access to any other tier of service. The basic tier must include, at a minimum, all must-carry signals, all PEG channels, and all domestic television signals other than superstations. The cable operator may add other channels of programming to its basic tier at its discretion. The statutory definition preempts provisions in franchise agreements that require additional services to be carried on the basic tier.

(c) Buying-Through Basic Service to Other Tiers

41. Subscribers must purchase the basic service tier in order to gain access to video programming offered on a per-program or per-channel basis. The Report and Order finds that purchase of the basic tier is not required in order to buy non-video programming services such as cable radio.

(d) A Single Basic Tier

42. Cable operators subject to rate regulation may have only one "basic" tier which must be unbundled from all other tiers; multiple basic tiers will not be permitted for rate regulation purposes.

(2) Regulations Governing Rates of the Basic Service Tier

(a) Statutory Standards

43. The Cable Act of 1992 requires the Commission to establish regulations that will assure reasonable rates for the basic service tier, but does not explicitly define "reasonable." Instead, it requires that regulations be designed to achieve statutory goals and take into account the enumerated statutory factors. We conclude that the statute does not require the Commission to place primary weight on any of the statutory factors governing rates for the basic service tier, but that we may do so as part of a reasoned balancing of statutory requirements and factors. Based on statutory findings and goals, as well as results from the Commission's industry survey, we have determined that under the statute the Commission can, and should, place primary weight on the rates of systems subject to effective competition. Accordingly, the Commission's regulations governing rates for the basic service tier are aimed toward achieving rate levels that are closer to rates of systems subject to effective competition.

(b) Benchmarking versus Cost-of-Service Regulation

44. The Commission examines the relative merits of a benchmarking versus a cost-of-service approach as the primary method for regulating rates for the basic service tier. We conclude that we should incorporate a benchmark into our framework for regulation of basic service tier rates because a benchmark can protect consumers from excessive rates and keep the costs of administration and compliance low. The Commission's rules, however, allow cable operators to use cost-of-service principles to justify rates higher than permitted by the system's benchmark.

(c) Local Authority Discretion

45. The Report and Order concludes that local authorities may not elect cost-of-service regulation as their primary mode of regulation of the basic service tier because such an approach would establish a regulatory regime for the basic service tier that is less consistent with Congressional intent than benchmark regulation. Rather, local governments must apply the benchmark system of rate regulation adopted by the Commission, unless a cable operator chooses to make a cost-of-service showing.

(d) Basic Rate Level in Comparison to Other Tiers

46. The Commission declines to adopt a regulatory framework for cable service that seeks lower rates for the basic service tier in comparison to higher tiers. We believe that any advantages in producing a low priced basic tier are outweighed by the incentives for cable operators to reduce offerings on the basic service tier. Accordingly, the Commission establishes a tier neutral framework for rate regulation that applies the same standards of reasonableness to the basic service tier and to cable programming services.

(e) Adoption of a Benchmark to Govern Rates for the Basic Service Tier

AA. The Competitive Benchmark

47. The Report and Order discusses the various benchmark alternatives proposed in the Notice. We find that the Cable Act of 1992 reflects a congressional conclusion that current rates for cable service result, in part, from an ability to raise rates to unreasonable levels because of a lack of effective competition, and that rates are unreasonable to the extent they exceed competitive levels. Our industry survey confirms that rates of systems not subject to effective competition exceed competitive levels by approximately 10 percent on an average industry basis. Based on the statute and the results of the Commission's industry survey, we conclude that the reasonableness of rates of the basic service tier shall be determined by reference to the rates of systems

subject to effective competition. The Commission, therefore, adopts a table of benchmarks based on the average September 30, 1992 rates of systems subject to effective competition.

BB. System Characteristics

48. The Commission applies different benchmark rates to systems based on the individual system's number of channels, subscribers, and satellite signals, but our industry survey does not provide a sufficient basis for identifying other system characteristics that would warrant application of different rate structures. As the Commission gains more experience with cable rate regulation, it may reevaluate this conclusion.

CC. Application of the Benchmark to Determine Initial Regulated Rate Levels

49. The Commission concludes that it will consider reasonable a per channel rate for the basic service tier that is at, or below, the benchmark level when a system becomes subject to regulation. Where a cable system is not charging rates that are above the competitive benchmark we can assume that its rates do not reflect undue market power, even in the absence of effective competition. Therefore, the initial regulated rate for such a system shall be its rate in effect on the date the system becomes subject to regulation, regardless of the amount that rate is below the benchmark.

50. Rates exceeding the applicable benchmark at the time regulation begins are presumptively unreasonable because they exceed the average rate charged by systems subject to effective competition. Some systems with rates at the onset of regulation that are above the benchmark may have had rates that were below the benchmark on September 30, 1992. Such systems are not subject to a rollback from levels in effect on September 30 because the rates were presumptively reasonable on that date. These systems must reduce rates from existing levels to the benchmark, but they may maintain increases from September 30, 1992 levels up to the benchmark and adjust rates to reflect inflation.

51. For a system with basic tier rates above the benchmark both when it becomes subject to regulation and on September 30, 1992, the maximum permitted rate will be the September 30, 1992 rates reduced 10 percent, but no lower than the benchmark rate for that system.

52. Instead of requiring all systems to now reduce rates to benchmark levels, the Commission will take the following steps to address systems with September 30, 1992 rates more than 10 percent above the benchmark: 1) conduct further surveys to refine the competitive benchmark, and further assess the competitive rate

differential between systems subject, and not subject, to effective competition, and to gather cost information; 2) examine in the Further Notice whether the Commission can, or should, exclude from competitive benchmark calculations, systems with less than 30 percent penetration; and 3) carefully scrutinize rates of cable systems that exceed the benchmark by significant amounts even after the 10 percent rollback through cost investigations.

53. The foregoing determinations define the initial permitted rate for the basic service tier when the system becomes subject to regulation. Those systems with initial rates based on adjusted September 30, 1992 rates, may further adjust those rates to reflect inflation occurring between September 30, 1992 and the time when regulation of the basic service tier begins. They must also apply an efficiency adjustment, specified in the rules, to those rates if the total number of subscribers or channels on the system changes between September 30, 1992 and the time of regulation. After those adjustments are made, the initial permitted rate for the basic service tier will then be capped as described in the next section.

(f) Adoption of the Price Cap

AA. In General

54. The Commission adopts a price cap mechanism to assure that future rate increases remain within reasonable bounds. We have found that a price cap approach is an effective alternative to cost-of-service regulation in other regulated areas, and that this approach is consistent with our statutory mandate. At the same time, the Commission has provided for adjustments to the price cap, based on inflation and other factors beyond an operator's control, to assure that the cap does not unduly restrict cable operators' ability to recover costs. The possibility of a cost-of-service showing will also assure that cable operators can recover appropriate costs of service. The price cap rate for the basic service tier will be expressed as a rate per channel to facilitate rate calculations and review.

BB. Application of the Cap to Systems with Current Rates Below the Benchmark

55. The price cap applies to all regulated systems, including those systems with rates that are below the benchmark on the date that regulation commences, unless a cable system justifies higher rates based on cost-of-service principles.

CC. Annual Adjustment Index

56. The Commission establishes an annual adjustment index that permits changes in each system's cap for the basic

service tier based on general changes in the cost of doing business. We adopt the GNP fixed weight price index (GNP-PI) as the annual adjustment index for the cap for basic service tier rates. Under our rules, cable operators may adjust the capped base per channel rate for the basic service tier annually after the final GNP-PI is published by the Department of Commerce for the preceding year. This approach represents the best balance between the administrative burdens imposed by more frequent rate adjustments and the need to permit prompt adjustments for inflation.

(g) External Costs

AA. Retransmission Consent Fees

57. The Commission concludes that retransmission consent costs should be treated as external to the benchmark. However, we are concerned that external treatment during the initial period in which cable operators and broadcasters will establish retransmission consent agreements, may unduly skew incentives away from fair bargaining for reasonable retransmission fees. The Commission believes that a delay in onset of external treatment for retransmission consent fees will serve to protect subscribers from any precipitous increase in rates after October 6, 1993. Hence, we will accord retransmission consent costs external treatment only after October 6, 1994 and only for new or additional fees beyond those already in effect on October 6, 1994. The Commission will also monitor initial retransmission consent agreements and their potential impact on subscribers and may reexamine external treatment if it appears that retransmission consent fees have an unwarranted impact on subscribers.

BB. Other External Costs

58. Programming Costs Other Than Retransmission Consent. The Commission will treat programming cost increases, other than retransmission consent, as external to the benchmark. We will monitor the impact of external treatment of programming cost increases and consider making programming costs subject to the cap if it appears that this treatment is disserving subscribers. The Commission's accounting and cost allocation requirements will determine the share of programming costs to be allocated to the basic service tier. The Report and Order also limits external treatment of programming costs for programming obtained from affiliated entities to the percentage change in the admissions component of the Consumer Price Index between the effective date of the price increase and the date the previous price took effect.

59. Taxes, Franchise Fees, Cost of Franchise Requirements. The Commission also excludes from the cap taxes, franchise fees and the costs of satisfying franchise requirements, including the costs of satisfying franchise requirements for local,

public, educational and governmental (PEG) access channels. The Commission's accounting and cost allocation requirements provide that costs associated with PEG channels carried on the basic tier will be directly assigned to the basic tier where possible and remaining costs will be allocated between tiers in proportion to the number of channels on each tier.

CC. Starting Date for External Treatment

60. For all categories of external costs other than franchise fees, changes in external costs shall be measured from date on which the system becomes subject to regulation, or 180 days from the effective date of our regulations (December 20, 1993), whichever occurs first. Thus, any changes in external costs occurring prior to that date, including from September 30, 1992, will not be accorded external treatment.

61. The industry competitive rate level derived from the Commission's survey data has been adjusted to remove franchise fees. Thus, the Commission permits the total amount of franchise fees to be accorded external treatment at the time the system becomes subject to regulation, rather than only the amount of additional franchise fees incurred after that date.

DD. Limitation on External Treatment for Increases Less Than Inflation

62. For all categories of external costs, other than franchise fees, the Commission permits external treatment for increases in such costs only to the extent that they exceed inflation as measured by the GNP-PI. This requirement does not apply to franchise fees, however, because the benchmark and the Commission prescribed formula for determining the permitted channel rate, are adjusted to exclude franchise fees. Thus, the total amount of increases in franchise fees will be accorded external treatment. Similarly, since the benchmark does not reflect retransmission consent fees, we will accord external treatment to the total amount of retransmission consent fees, after October 4, 1994.

(h) Cost-of-Service Showings

AA. The Opportunity to Justify Rates Above the Cap Based On Costs

63. The Commission has determined that its primary method of regulating cable service rates shall be a price cap mechanism applied to rates determined in relation to the competitive benchmark. However, the starting price cap level is based on industry-wide data and does not necessarily reflect individual systems' costs of providing cable service. Thus, the Commission cannot be certain that the initial capped rate will

permit all cable operators to fully recover the costs of providing basic tier service and to continue to attract capital. Accordingly, a cable operator is permitted to make a cost-of-service showing to determine the reasonable rate for its system. The resulting rate determination will supercede our benchmark/rollback provisions. Thus, an operator may exceed the benchmark or capped rate if it can make the necessary cost showings in certain circumstances. Similarly, however, a cost-of-service determination resulting in a rate below that system's September 30, 1992 rate minus 10 percent will prescribe that system's new rate. The Commission rejects the alternative of not permitting cable operators to exceed the cap unless the rate as applied to them is confiscatory.

BB. Cost-of-Service Standards

64. The Report and Order adopts cost-of-service standards to govern the extent to which cable operators may exceed capped rates for the basic service tier based on costs. In the future, it may be appropriate for local franchising authorities to assume a larger role in setting cost-of-service standards for the basic tier, but the Commission believes that presently these standards should be established at the national level. However, the current record does not contain sufficient information for the Commission to adopt final cost-of-service standards for cable service at this time. Accordingly, a Second Further Notice of Proposed Rulemaking will be issued shortly to seek additional comment on the development of appropriate standards.

65. Pending this rulemaking, which the Commission intends to complete on an expedited basis, cable operators may elect to maintain current above benchmark rates and attempt to justify them in their initial rate filings pursuant to the general principles for cost-of-service regulation. Alternatively, operators may elect to reduce these rates as required by our benchmark regulations. Cable operators that reduce rates in accordance with Commission requirements may seek to raise rates above the cap pursuant to the general procedures the Commission is establishing for cable operators seeking rate increases for the basic service tier. Local authorities (or the Commission in situations where it regulates basic rates) will review cost-of-service showings by cable operators seeking to raise rates above capped levels. Cable operators or subscribers may then appeal the local decision to the Commission. The Commission will review such local decisions on a case-by-case basis pending the cost-of-service rulemaking.

(3) Regulations Governing Rates for Equipment

(a) Equipment Covered

66. The Cable Act of 1992 requires the Commission to establish standards for setting, on the basis of actual cost, the rate for installation and lease of equipment used by subscribers to receive the basic service tier, and the installation and lease of monthly connections for additional television receivers.

67. The Commission concludes that equipment "used to receive the basic service tier" is broadly interpreted and includes converter boxes, remote controls, connections for additional television sets and cable home wiring. Our expansive reading of the phrase "used to receive the basic service tier" means that equipment and installations used to receive both basic tier service and other services would be regulated according to actual cost guidelines described below. Although the Commission believes that Congress intended the Commission's regulations to encourage a competitive market in the provision of equipment and service installation, the Commission does not have, at this time, the information it would need to establish a separate effective competition test for installation and equipment. The Commission has begun a proceeding to investigate these issues. Therefore, all systems subject to rate regulation must comply with the actual cost standards for equipment and service installations used to receive the basic service tier.

(b) Unbundling

68. Cable systems must unbundle charges for equipment, installation, and additional outlets from the rates for basic service. In addition an operator must calculate separate charges for installations, remote control units, converter boxes, and other customer equipment.

(c) Actual Cost Standard

69. Local franchising authorities regulating equipment used to receive the basic service tier shall require cable operators to establish an Equipment Basket to which the operator will assign the direct costs of service installation, leasing, maintaining and servicing customer equipment. The Basket will include an allocation of all system joint and common costs that installation, leasing and repairing equipment share with other system activities, excluding general system overhead. The Equipment Basket costs include a reasonable profit. An operator must also calculate an Hourly Service Charge ("HSC") through which it would recover all Equipment Basket costs (including a reasonable profit) except for the operator's costs of purchasing and financing the lease of customer equipment.

70. Charges for leasing each type of remote control unit shall be designed to recover the operator's cost of purchasing and financing the remote, and expected repair and service charges over the useful life of the equipment. Expected repair and service

charges are to be determined by multiplying the estimated average number of repair and service hours per remote by the HSC. Charges for leasing converter boxes and all other equipment shall be calculated in the same manner as for remotes. For installation charges, the cable operator must elect a uniform installation charge that is calculated based upon either: 1) the HSC times the person hours of the visit; or 2) the HSC times the average hours spent per installation visit.

71. The Commission's guidelines do not preclude an operator from selling equipment to subscribers. The equipment price shall be set at no higher than necessary to recover the operator's costs, including all costs incurred for storing and preparing equipment for sale up to the time it is provided to the customer, including a reasonable profit. The purchaser is responsible for maintaining and repairing any purchased equipment, but cable operators may also sell service contracts. The price of these contracts shall be based on the HSC times the estimated average number of hours required for maintenance and repair over the expected life of the equipment. The cable operator shall provide notice at the time of sale that system upgrades might make a customer's purchased equipment incompatible with the new cable system technology.

(d) Promotions

72. The Commission's rules permit cable operators to offer promotions, including a permanent below cost offering of installations. However, instead of allowing cable operators unlimited discretion to price all equipment and installation below cost, the Commission is requiring that below cost offerings be reasonable in scope in relation to the operator's overall offerings in the Equipment Basket. Cable operators must exclude the costs of promotions from the Equipment Basket, but may include these costs in general overhead as part of a cost-of-service showing. The Commission will review this treatment of promotional costs when it addresses the issue of whether the Commission should take steps to promote a competitive market for equipment.

(e) Additional Connections

73. The Commission is requiring that costs associated with the installation of, and equipment used with, additional connections be included in the Equipment Basket. Cable operators will recover the costs of additional connections in the charges for installation or lease of customer equipment used with the additional connection. The installation charge for additional connections is the HSC times the person hours of the visit or the HSC times the average number of hours spent per visit. If the operator elects to use an average installation time, the Commission is requiring two rates: one for wiring additional connections at the time of the installation and another if the operator makes a

separate visit to install the additional connection. Remotes and other equipment involved are to be leased to the customer at the same rate as equipment used with primary outlets. Any network costs for boosting the signal to serve more than one outlet in a home should be treated as part of general system overhead. If a subscriber requests additional connections that exceed network design capabilities and require additional customer premises equipment, the cable operator may recover the costs of the additional equipment through an additional connection charge, developed by using the Commission's actual cost guidelines for other leased equipment.

74. The Commission also allows a cable operator, if it incurs additional charges for programming carried on basic or cable programming services channels that it transmits to additional outlets, to recover these charges through a monthly charge levied for additional outlets in fact receiving that programming.

(4) Cost of Franchise Requirements

75. The Commission has determined that costs attributable to satisfying franchise requirements shall include: 1) the sum of per channel costs for the number of channels used to meet franchise requirements for public, educational and governmental channels; 2) any direct costs of providing any other services required under the franchise; and 3) a reasonable allocation of overhead.

(5) Customer Changes

76. The Cable Act of 1992 requires that regulation for the basic tier include standards and procedures to prevent unreasonable charges for a customer changing equipment or service tiers. The Commission concludes that these regulations should apply to any changes in the number of service tiers and charges for changing equipment that are initiated at the subscriber's request after the installation of initial service. These same standards should apply to upgrades and downgrades in service tiers. Furthermore, the Commission requires that customers be allowed 30 days after notice of retiering or rate increases to change service tiers at no charge.

77. Operators may impose only a nominal charge for changing service tiers effected solely by coded entry on a computer terminal or by other similarly simple method. The Commission considers any charge under $2.00 nominal. The Commission will also allow franchising authorities the discretion to consider additional community specific factors in evaluating these charges. However, these charges cannot exceed the actual costs of changing tiers, as discussed below.

78. The Commission recognizes that charges for changing tiers have the potential to increase customer churn, but the Commission lacks specific data on this topic. Therefore, the Commission has created an exception to the cap on rates for changing service tiers effected by coded entry on a computer terminal or other similar methods. Cable operators who believe their system has an increasing and unacceptable level of churn in service tiers may establish an increased charge for changing service tiers more than two times in one year. The operator must prove to the franchising authority that the churn level in cable service tiers has reached an unacceptable level and that its escalating scale of charges is reasonable. In addition, the cable system must notify all subscribers that they will be subject to an increased charge if they change service tiers more than the specified number of times in one year.

79. For changes in service tiers or equipment that involve more than coded entry on a computer or other similarly simple method, the Commission adopts the actual cost guidelines for equipment and installation. The actual cost charge would be either the HSC times the amount of time it takes to effect the change or HSC times the average times such changes take.

4. Regulation of Cable Programming Services

a. Definition of "Cable Programming Service"

80. Under the 1992 Act, regulation of "cable programming service" rates and equipment is to be conducted by the Commission, not local franchising authorities. "Cable programming service" is defined broadly in the statute as all video programming provided over a cable system except that provided on the basic service tier or on a per-channel or per-program basis. The Commission will also exclude per-program and per-channel premium services offered on a multiplexed or time-shifted basis.

b. Complaints Regarding Cable Programming Service Rates

(1) Procedures for Receiving, Considering, and Resolving Complaints

81. The 1992 Act provides that rate regulation of cable programming services and equipment will occur only in response to specific complaints -- i.e., the Commission will not regulate cable programming service rates until it receives a complaint that a particular operator's rates are unreasonable.

82. The 1992 Act permits subscribers, franchising authorities and other relevant government entities to file complaints about the rates for cable programming services and equipment. As required by law, complainants alleging that a cable operator's current cable programming rates are unreasonable will

have 180 days from the effective date of the Commission's rules to challenge existing rates. With regard to rate increases, complainants must file complaints about cable programming service and equipment rates within 45 days from the time subscribers receive a bill that reflects the rate increase.

83. In order to avoid dismissal of a complaint, the complainant must supply certain readily available factual information and must allege that the rate is unreasonable because it violates the Commission's rate regulations. Complainants must use the complaint form adopted by the Commission and serve a copy on the cable operator and franchising authority.

84. Subscribers need not obtain the franchising authority's concurrence before filing a complaint with the Commission. However, franchising authorities are encouraged to assist subscribers in completing complaint forms and subscribers are free to attach the views of the franchising authority when submitting a complaint to the Commission. Franchising authorities will not be permitted to formally review and adjudicate cable programming service complaints in the first instance.

85. Upon receipt of a cable programming service complaint submitted on the FCC form, the Commission will review the complaint to determine whether it meets the minimum showing needed to permit the complaint to go forward. The operator must respond to a complaint filed on the standard complaint form within 30 days of service of the complaint, unless the Commission notifies the operator that the complaint fails to satisfy the minimum showing requirement.

(2) Remedial and Enforcement Procedures for Rates Found to be Unreasonable

86. If cable programming service rates are found to be unreasonable, the Commission will order the operator to reduce rates prospectively and to reflect that reduction in prospective bills to customers. The operator will also be required to refund overages (plus interest) to subscribers, with refunds being calculated from the date the complaint was filed until the date the operator implements the reduced rate prospectively in bills to subscribers.

c. Regulations Governing Rates

(1) Statutory Standards

87. The Commission concludes that standards for identifying cable programming services rates that are unreasonable in individual instances will comply with the Cable Act of 1992 if they reflect a reasoned balancing of the statutory factors and if we explain how our standards reflect these statutory factors. The

Commission finds, while not mandated by the statute, that primary weight should be given to the rates of systems subject to effective competition.

88. The Commission believes that a "bad actor" test for cable programming service rates, designed to reach those cable operators whose rates for cable programming services are "egregious" would not fulfill the mandate of the Cable Act. We conclude that Congress used the term "unreasonable" in provisions regarding cable programming services rather than "reasonable" as a reflection of the different procedural regulatory scheme for protecting consumers from excessive rates for basic and for cable programming services. Congress did not require different substantive standards. Therefore, when assessing a complaint that a cable system's cable programming service rates are unreasonable, the Commission will use the same test of reasonableness adopted for basic service rate regulation.

(2) Benchmarking versus Cost-of-Service

89. As for the basic service tier, the Commission will use a benchmark approach as the principal form of rate regulation for cable programming services, with cost-of-service showings used only by cable systems whose rates exceed the benchmark.

(3) Adoption and Application of the Benchmark and Price Cap for Cable Programming Services

90. The Commission adopted the same competitive benchmark for cable programming services as for the basic service tier and applies it in the same manner to determine the initial permitted per channel rate for cable programming services. The Commission also adopts the same price cap requirements for cable programming service as for the basic service tier, including the same annual adjustment index, and requirements for, and treatment of, external costs.

91. Systems with a per channel rate for cable programming services at or below the benchmark at the time the system becomes subject to regulatory review will be considered reasonable and that rate will be its permitted rate. Systems with rates in effect at the time of regulation that are below the benchmark will be capped at that level. For systems with rates at the time of regulation that are above the benchmark, the permitted level for such systems will be determined by a further comparison to the benchmark of rates in effect on September 30, 1992. For systems with September 30, 1992 rates that are above the benchmark, the rate shall be the September 30, 1992 per channel rate reduced by of 10 percent, but no lower than the benchmark, and then adjusted forward by inflation. For systems with rates on September 30, 1992 that were below the benchmark, the permitted rate shall be the benchmark rate adjusted forward by inflation. The price cap

will then be applied to the per channel rate determined by the above comparison of rates to the benchmark. Price cap requirements will be the same as for the basic service tier.

(4) Secondary Cost-of-Service Showings

92. As for basic service, the Commission will permit cable operators to exceed the benchmark rate for cable programming services based on costs. Similarly, the Commission will adopt cost-of-service standards for application by the Commission to determine the extent to which cable operators may exceed capped rates for cable programming services. However, as for the basic service tier, the record does not permit the Commission to fashion cost-of-service standards at this time. Accordingly, we will adopt and issue separately a Second Further Notice to establish cost-of-service standards for cable services including cable programming services.

(5) Installation or Rental of Equipment Used to Receive Cable Programming Services

(a) Equipment Subject to Regulation as Cable Programming Services

93. Complaints concerning rates for equipment and installation used to receive cable programming services, either solely or in conjunction with unregulated programming, shall be subject to the same actual cost standard implemented for basic tier equipment and installation. The costs of equipment and installation used to receive cable programming services shall be included in the Equipment Basket and the charges associated with this equipment shall be determined on the same basis as charges for other equipment subject to the actual cost methodology. However, because the Commission has jurisdiction over cable programming services, it will review any complaints or issues concerning such equipment or installation.

(b) Unbundling of Rates for Installation and Rental of Equipment Used to Receive Cable Programming Services

94. The Commission concludes that cable operators should be required to unbundle equipment and installation rates from equipment used to receive these services. The Commission also concludes that cable operators shall be required to unbundle installation rates for cable programming services from rates for equipment leasing.

5. Provisions applicable to Cable Service Generally

a. Geographically Uniform Rate Structure

95. The Cable Act of 1992 requires cable operators to "have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system." The Commission concludes that a cable system must have a uniform rate structure throughout the franchise area. This requirement, however, does not preclude operators from establishing reasonable categories of customers and services. The Commission concludes that for purposes of the Cable Act of 1992 a geographic area means the franchise area. Thus, a cable operator is generally required by this provision to have a uniform rate structure within each franchise area.

b. Discrimination

96. A cable operator may offer reasonable discounts to senior citizens and other economically disadvantaged individuals. For this purpose, an "economically disadvantaged individual" is defined as a person who receives federal, state or local welfare assistance.

c. Negative Option Billing

97. The 1992 Act provides that an operator may not charge a subscriber for "any service or equipment that the subscriber has not affirmatively requested by name." This limitation on so-called "negative option billing" applies whenever a new tier or single channel service is added. However, restructuring undertaken to respond to the Commission's new rate regulations will not bring the negative option billing provision into play as long as subscribers continue to receive the same number of channels and the same equipment, and the total price for the services does not change. On a going-forward basis, the provision does not apply to changes in the mix of channels in a tier, or restructurings of service, even when those changes are accompanied by a rate increase, unless the changes alter the fundamental nature of the service tier.

d. Collection of Information

98. The Commission at this time will not establish collection of information requirements. The Commission will explore this issue in a Second Further Notice in the future.

e. Prevention of Evasions:

99. Prohibited "evasions" are defined as any practice or action which avoid the rate regulation provisions of the 1992 Act or the Commission's rules contrary to the intent of the Act or its underlying policies.

f. Small System Burdens

100. Franchise authorities regulating small cable systems are permitted to exempt those systems from having to file an initial rate schedule with the franchising authority. In such cases, the small system need simply certify to the authority that its rates for basic service and equipment are reasonable and are within the applicable benchmark formula. However, a small system whose rates exceed the benchmark, a small system proposing to increase its basic service rates or a small system that is the subject of a cable programming service complaint is not exempted from the procedures the Commission has established. For these purposes, a "small system" is a system served by an integrated headend with fewer than 1,000 subscribers.

g. Grandfathering of Rate Agreements

101. Franchising authorities already regulating rates pursuant to a franchise agreement executed before July 1, 1990 may continue to regulate basic service and equipment rates for the remainder of the franchise term without following the Commission's substantive rate standards and without filing a certification with the Commission. Authorities with agreements signed after that date must be certified by the Commission.

h. Reports on Average Prices

i. Effective Date

102. The Cable Act of 1992 states that the amendments to Section 623 of the Communications Act that mandate rate regulation by the Commission of cable systems that are not subject to effective competition shall become effective 180 days from the date of the enactment of the Act. The Commission concludes that by adopting the Report and Order it meets the effective date requirements of the Cable Act of 1992. The Commission establishes June 21, 1993 as the effective date of its regulations adopted in the Report and Order.

B. Leased Commercial Access

1. Leased Access: Background

103. The Communications Act requires that cable systems with 36 or more channels make available a portion of their channel capacity for lease by outside unaffiliated parties. Under the Cable Act of 1992, the Commission is provided with expanded authority to regulate the commercial leasing of cable channels for those cable systems required to make such channel capacity available.

2. Leased Access: Terms and Conditions of Use

104. A the cable operator and commercial leased access user may negotiate channel placement and tier access for leased programming. Parties must take into account the nature of the service; the relationship between the charge imposed and the desirability of the channel; and, the need to provide competition in delivery service and diversity of programming. Cable operators may not apply programming production standards to leased access users that are any higher than those applied to PEG channels. Operators must also provide the minimal amount of technical support necessary for users to air their material. Operators are also entitled to be reimbursed for such services. Reasonable security deposits to lease channels may be requested from users by cable operators. Cable operators may not set terms and conditions for users based on content except to the extent necessary to establish a reasonable price for use of channel capacity and to comply with the Commission's indecency standards. Cable operators are also required to provide billing and collection services for leased access users, unless the operator demonstrates the existence of third party billing and collection services which in terms of cost and accessibility, offer leased access users an alternative substantially equivalent to that offered comparable non-leased programmers.

3. Leased Access: Maximum Reasonable Rates

a. Leased Access

105. The maximum commercial leased access rates that a cable operator may charge is the highest net implicit fee charged any nonaffiliated programmer within the same program category. The implicit rate is calculated by determining the amount paid per month by subscribers for the service and deducting from that the amount that is paid per month to the programming service vendor. The difference between the amount received and the amount paid is the net implicit leased channel rate. Such rates are to be calculated separately for (1) pay-per-program or pay channels, (2) channels containing more than fifty percent direct sales (home shopping networks), (3) and all other channels.

b. Access Rates for Not-for-Profit-Programmers

106. The Commission declines to establish special rates for not-for-profit programmers, or to require that operators set-aside capacity for such purposes. The Commission finds that the procedures adopted for establishing maximum reasonable rates adequately ensure that the interests of such programmers are considered.

4. Leased Access: Reporting Requirements

107. Although specific reporting requirements for leased access will not be implemented, the Commission will gather necessary leased access information on leased channel usage and rates in its general reporting and monitoring process mechanisms for cable systems.

5. Leased Access: Procedures for Resolution of Disputes

108. Review of leased access rates or terms and conditions will be triggered by the filing of a complaint at the Commission. A streamlined process has been developed to handle these complaints so that they can be handled expeditiously.

6. Leased Access: Minority and Educational Programmers Alternative

109. In accordance with the statutory provisions, up to 33 percent of a system's designated leased channel capacity may be used for qualified minority or educational programming purchased by the system operator rather than by leased channel programming.

C. Subscriber Bill Itemization

110. Cable operators may identify as a separate line item on each subscriber bill the amount of any fee, tax, assessment or charge imposed by a government entity on the transaction between the operator and the subscriber.

D. Cost Accounting/Cost Allocation Requirements

111. The rate regulations that the Commission has adopted impose a price cap on cable service rates with certain categories of costs defined as external to the cap. Cost accounting and cost allocation requirements are necessary to assure that costs that are intended to receive external treatment are in fact accorded such treatment. The regulations additionally authorize cable operators to make cost-of-service showings to justify a rate higher than the capped level. Cost accounting and cost allocation requirements are also necessary to permit identification of costs that will justify a rate above the cap.

112. The Commission has an insufficient record on which to determine the optimum level of rate averaging for the cable industry. Accordingly, while the Commission is adopting in the Report and Order requirements that will permit immediate implementation of our rules, the Commission has determined that it will include in a Second Further Notice issues pertaining to what cost accounting and cost allocation requirements should be adopted on a permanent basis.

113. The cost accounting rules the Commission adopts will nevertheless permit a successful immediate implementation of rate regulations. Cable operators are required to identify certain locally incurred costs such as franchise fees and local taxes at the franchise level. For purposes of calculating external costs or cost of service, cable operators shall identify costs at the level at which, for accounting purposes, they identified the category of costs on April 3, 1993. Cable operators are required to justify and explain this identification and that it is, in fact, the level used to identify costs on April 3, 1993. Costs are then to be allocated to the franchise level on a per subscriber basis.

III. Further Notice of Proposed Rulemaking

114. The Commission solicits comment on whether we should, and may lawfully, exclude the rates of systems in low penetration areas in calculating the competitive rate differential. The Report and Order explains that we calculated the competitive rate differential based on a comparison of data collected from systems subject to effective competition with data from systems not subject to effective competition. Our industry survey was based on data from systems subject to effective competition under each of the three independent statutory criteria used to define effective competition in Section 3 of the 1992 Cable Act, including systems expected to have less than 30 percent cable penetration. It is possible, however, that exclusion from our sample of rates of systems in low penetration areas may produce a better measure of competitive rate differential because low penetration may be attributable to factors other than the presence of competition. Our preliminary analysis reveals that the exclusion of low penetration systems will produce a competitive rate differential of between 25 and 30 percent.